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EVERGREEN RESEARCH AND MARKETING, LLC

**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

EVERGREEN RESEARCH AND  
MARKETING, LLC,

Plaintiff,

v.

CABOKI, INC., CABOKI, LLC AND DOES  
1 - 20,

Defendant.

Case No.: '13CV0156 WQHMD

**COMPLAINT FOR:**

- (1) TRADEMARK INFRINGEMENT  
UNDER 15 U.S.C. §§ 1114 AND  
1125(a);**
- (2) UNFAIR COMPETITION AND  
FALSE ADVERTISING UNDER 15  
U.S.C. § 1125(a); AND**
- (3) UNFAIR COMPETITION AND  
FALSE ADVERTISING UNDER  
CAL. BUS. & PROF. CODE §§ 17200  
AND 17500, *ET SEQ.*;**

**DEMAND FOR JURY TRIAL**

Plaintiff EVERGREEN RESEARCH AND MARKETING, LLC complains and alleges  
against Defendant CABOKI, INC., CABOKI, LLC and DOES 1 – 20 as follows:

**PARTIES**

1. Plaintiff EVERGREEN RESEARCH AND MARKETING, LLC (“Plaintiff”) is a  
limited liability company organized under the laws of the State of California with its principal  
place of business at 2261 Rutherford Road, Carlsbad, California, 92008.





1 a natural end result without the use of harsh chemicals that can damage hair. Miracle Hair will  
2 not stain clothing or skin and is weather and perspiration resistant.

3 11. Plaintiff has devoted substantial time, effort and resources to the development and  
4 extensive promotion of the MIRACLE HAIR® mark including, but not limited to, paid  
5 television advertising. As a result of Plaintiff's efforts, the public has come to recognize and rely  
6 upon the MIRACLE HAIR® mark as an indication of the high quality associated with the  
7 product sold by Plaintiff under the same name.  
8

9 12. On September 4, 2012, the United States Patent & Trademark Office ("PTO")  
10 issued to Plaintiff, U.S. Trademark Registration No. 4,203,553 for the mark MIRACLE HAIR.  
11 A true and correct copy of this registration is attached as Exhibit A.

12 13. The MIRACLE HAIR registration is in full force and effect on the PTO's  
13 Principal Register, and gives rise to presumptions in favor of Plaintiff with respect to validity,  
14 ownership and exclusive rights to use the MIRACLE HAIR mark throughout the United States.  
15

16 14. Defendant offers a virtually identical product to Miracle Hair called Caboki. As  
17 represented by Defendant, Caboki instantly eliminates bald spots or appearance of thinning hair;  
18 gives the user a perfectly natural look that is undetectable; will last all day, all night, through  
19 wind, rain and sweat; will not smear or stain the user's skin or clothing; is made of natural fibers  
20 from plants; bonds to hair more securely; and is free of animal ingredients, synthetic dyes, fillers  
21 and preservatives.  
22

23 15. In order to increase sales of Caboki, Defendant engages in a number of activities  
24 that infringe on Plaintiff's MIRACLE HAIR® trademark and constitutes false advertising and  
25 unfair competition. For example, Defendant has purchased and used, without authorization,  
26 Plaintiff's MIRACLE HAIR® trademark as a "keyword" in several Internet keyword advertising  
27  
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1 programs, including, but not limited to, Google and Youtube. As a result, when a consumer types  
2 in “Miracle Hair” as a search term on the Google or Youtube search fields, the consumer is  
3 confronted with a list of advertisements from Defendant that directly offer Defendant’s product  
4 and offers information on Defendant’s product. A true and correct copy of Google search results  
5 for the term “Miracle Hair” on September 17, 2012 and September 26, 2012 are attached as  
6 Exhibit B. A true and correct copy of Youtube search results for the term “Miracle Hair” on  
7 January 8, 2013 and January 17, 2013 are attached as Exhibit C.

8  
9 16. Defendant also routinely uses Plaintiff’s MIRACLE HAIR® trademark in the  
10 header and/or text of the resulting sponsored links that appear when a consumer types “Miracle  
11 Hair” as a search term in an Internet search engine or on an advertising site such as Youtube or  
12 Ebay.

13 17. Defendant has also stated in its Internet advertising that the product is “as seen on  
14 TV.” On information and belief, Defendant has not actually advertised its product on television.  
15 In contrast, Plaintiff has spent significant resources advertising Miracle Hair on television.  
16 Defendant is attempting to use Plaintiff’s television advertising to deceive customers into  
17 believing that they had seen Defendant’s product on television and to confuse consumers into  
18 buying Defendant’s product when they are attempting to buy Plaintiff’s product. Defendant has  
19 linked sponsored advertising under the titled “as seen on TV” to Plaintiff’s product and the  
20 keywords “miracle hair” on Google, Youtube and Ebay.

21  
22 18. Defendant’s unauthorized use of Plaintiff’s MIRACLE HAIR® mark, as  
23 keywords and in the header and/or text of the resulting sponsored links, and by falsely stating the  
24 product is “as seen on TV,” is likely to confuse, mislead and deceive consumers as to the source  
25 of products available through Defendant’s website.  
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1           19.     On information and belief, Defendant knows or should know that it is engaging in  
2 all of the activities alleged in this Complaint and that those activities serve to confuse and lure  
3 potential customers of Plaintiff to Defendant.

4           20.     Actual confusion has resulted as evidenced by several consumers contacting  
5 Plaintiff to ask if the Caboki product that is "as seen on TV" is the same product as Miracle  
6 Hair. Plaintiff has not consented to, sponsored, endorsed or approved of Defendant's use of the  
7 MIRACLE HAIR® trademark in connection with the manufacture, marketing or sale of any  
8 products or services.  
9

10          21.     On information and belief, Defendant's actions are willful and reflect the intent to  
11 confuse consumers and profit from the goodwill and consumer recognition associated with  
12 Plaintiff's mark.

13          22.     Defendant's Caboki product is marketed and sold and offered through the same  
14 channels of distribution and to the same target customers as Plaintiff's product.  
15

16          23.     Plaintiff sent demand letters to Defendant on or about September 18, 2012 and  
17 September 26, 2012 demanding that Defendant cease and desist use of Plaintiff's mark and  
18 falsely advertising Defendant's product.

19          24.     As of the date of this Complaint, Defendant continues to use the MIRACLE  
20 HAIR® trademark, without authorization. Defendant's failure to comply with Plaintiff's  
21 demands demonstrates a deliberate intent to continue wrongfully competing with Plaintiff and to  
22 willfully infringe Plaintiff's rights in the MIRACLE HAIR® trademark.  
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**FIRST CAUSE OF ACTION**

**FEDERAL TRADEMARK INFRINGEMENT UNDER 15 U.S.C. §§ 1114 AND 1125(a)**

25. Plaintiff incorporates the foregoing allegations as if fully set forth herein.

26. The actions of Defendant described above and specifically, without limitation, their unauthorized use of the MIRACLE HAIR® trademark in commerce to advertise, promote, market and sell Caboki throughout the United States including California, constitutes trademark infringement in violation of 15 U.S.C. §§ 1114 and 1125(a).

27. The actions of Defendant, if not enjoined, will continue. Plaintiff has suffered and continues to suffer damages in an amount to be proven at trial consisting of, among other things, diminution in the value of and goodwill associated with the MIRACLE HAIR® mark and injury to Plaintiff's business. Plaintiff is therefore entitled to injunctive relief pursuant to 15 U.S.C. § 1116.

28. Pursuant to 15 U.S.C. § 1117, Plaintiff is entitled to recover damages in an amount to be determined at trial, profits made by Defendant on sales of Caboki, and the costs of this action. Furthermore, Defendant is informed and believes, and on that basis alleges, that the actions of Defendant were undertaken willfully and with the intention of causing confusion, mistake or deception, making this an exceptional case entitling Plaintiff to recover additional treble damages and reasonable attorney's fees pursuant to 15 U.S.C. § 1117.

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**SECOND CAUSE OF ACTION**

**FEDERAL UNFAIR COMPETITION AND FALSE ADVERTISING UNDER 15 U.S.C.**

**§1125(a)**

29. Plaintiff incorporates the foregoing allegations as if fully set forth herein.

30. Defendant's actions described above and specifically, without limitation, Defendant's use of the MIRACLE HAIR® trademark in commerce to advertise, market and sell Caboki throughout the United States including California; Defendant's unauthorized use of Plaintiff's MIRACLE HAIR® mark, as keywords and in the header and/or text of the resulting sponsored links, and Defendant's false statement that their product is "as seen on TV," constitutes unfair competition and false advertising in violation of 15 U.S.C. § 1125(a).

31. Consumers are likely to be misled and deceived by Defendant's misrepresentations regarding its products.

32. Defendant knew or should have known that its statements and use of Miracle Hair keywords were false or likely to mislead.

33. As an actual and proximate result of Defendant's willful and intentional actions, Plaintiff has suffered damages in an amount to be determined at trial, and unless Defendant is enjoined, Plaintiff will continue to suffer irreparable harm and damage to its business, reputation and goodwill.

34. Pursuant to 15 U.S.C. § 1117, Plaintiff is entitled to damages for Defendant's Lanham Act violations, an accounting for profits made by Defendant on sales of Caboki, as well as recovery of costs of this action. Furthermore, Defendant is informed and believes, and on that basis alleges, that the actions of Defendant were undertaken willfully and with the intention of



1 causing confusion, mistake or deception, making this an exceptional case entitling Plaintiff to  
2 recover additional treble damages and reasonable attorney's fees pursuant to 15 U.S.C. § 1117.

3 **THIRD CAUSE OF ACTION**

4 **STATUTORY UNFAIR COMPETITION AND FALSE ADVERTISING UNDER**  
5 **CALIFORNIA BUSINESS AND PROFESSIONS CODE §§17200 AND 17500 ET SEQ.**

6 35. Plaintiff incorporates the foregoing allegations as if fully set forth herein.

7 36. Defendant's actions described above and specifically, without limitation,  
8 Defendant's use of the MIRACLE HAIR® trademark in commerce to advertise, market and sell  
9 Caboki throughout the United States including California; Defendant's unauthorized use of  
10 Plaintiff's MIRACLE HAIR® mark, as keywords and in the header and/or text of the resulting  
11 sponsored links, and Defendant's false statement that their product is "as seen on TV," constitutes  
12 trademark infringement, unfair competition and false advertising in violation of the laws of the  
13 State of California.  
14

15 37. By these actions, Defendant has engaged in false advertising and unfair  
16 competition in violation of the statutory law of the state of California, Cal. Bus. & Prof. Code §§  
17 17200 and 17500 *et seq.*, and, as a result, Plaintiff has suffered and will continue to suffer damage  
18 to its business, reputation and goodwill.  
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20 38. As a direct and proximate result of Defendant's willful and intentional actions,  
21 Plaintiff has suffered damages in an amount to be determined at trial and, unless Defendant is  
22 restrained, Plaintiff will continue to suffer irreparable damage.  
23

24 **DEMAND FOR JURY**

25 39. Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff demands a trial by  
26 jury of all claims in this Complaint so triable.  
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**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays that this Court enter judgment against Defendant as follows:

- (a) That Plaintiff be granted injunctive relief under 15 U.S.C. § 1051 *et seq.* and California Business and Professions Code §§ 17200 and 17500 *et seq.* that Defendant and all of its officers, agents, servants, representatives, employees, attorneys, and all other persons acting in concert with them be enjoined from:
1. using the MIRACLE HAIR® mark, or any mark confusingly similar to the MIRACLE HAIR mark, in connection with the marketing, promotion, advertising, sale or distribution of any hair building product;
  2. directly or indirectly engaging in false advertising or promotions of Caboki or other similar products; and
  3. making or inducing others to make any false, misleading or deceptive statement of fact in connection with the promotion, advertisement, packaging, display, sale, offering for sale, manufacture, production, circulation or distribution of Caboki or other similar products;
- (b) That Defendant file, within ten (10) days from entry of an injunction, a declaration with this Court signed under penalty of perjury certifying the manner in which Defendant has complied with the terms of the injunction;
- (c) That Defendant be ordered to correct any erroneous impression persons may have derived concerning the nature, characteristics or qualities of either Plaintiff's

1 MIRACLE HAIR® product or Defendant's Caboki product, including without  
2 limitation:

- 3 1. the sending of a registered letter (with a copy to Plaintiff) to all  
4 internet search engines, including but not limited to, Google and  
5 Yahoo!, and any internet advertising sites, including but not limited to,  
6 Youtube, requesting that Defendant's keyword advertising and  
7 sponsored advertisements be removed from their sites; and  
8  
9 2. the placement of corrective advertising on Defendant's websites  
10 informing consumers of their prior misrepresentations regarding  
11 Defendant's product;

12 (d) That Defendant be adjudged to have violated 15 U.S.C. § 1125(a) by unfairly  
13 competing against Plaintiff by using false, deceptive or misleading descriptions or  
14 representations of fact that misrepresent Defendant's product;

15 (e) That Defendant be adjudged to be unlawfully and unfairly competing against  
16 Plaintiff under the laws of the State of California, Cal. Bus. & Prof. Code §  
17 17200, *et seq.*;

18 (f) That Defendant be adjudged to have competed unlawfully and unfairly against  
19 Plaintiff by engaging in false or misleading advertising under the laws of the State  
20 of California, Cal. Bus. & Prof. Code § 17500, *et seq.*

21 (g) That Plaintiff be awarded damages pursuant to 15 U.S.C. § 1117(a), sufficient to  
22 compensate it for the damage caused by Defendant's false and misleading  
23 statements;  
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- 1 (h) That Plaintiff be awarded Defendant's profits derived by reason of said acts, or as  
2 determined by said accounting;
- 3 (i) That such damages and profits be trebled and awarded to Plaintiff and that it be  
4 awarded its costs, attorney's fees and expenses in this suit under 15 U.S.C. §  
5 1117, as a result of Defendant's willful, intentional and deliberate acts in violation  
6 of the Lanham Act;
- 7 (j) That Plaintiff be awarded damages in an amount sufficient to compensate it for  
8 damage caused by Defendant's unfair competition and false advertising under  
9 California Business and Professions Code §§ 17200 and 17500 *et seq.*;
- 10 (k) That Plaintiff be granted prejudgment and post judgment interest;
- 11 (l) That Plaintiff be granted costs associated with the prosecution of this action; and
- 12 (m) That Plaintiff be granted such further relief as the Court deems equitable and just.
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16 Dated: January 18, 2013

ATKINS & DAVIDSON, APC

17  
18 By: s/ Todd Atkins  
19 Todd C. Atkins  
20 Attorneys for Plaintiff  
21 EVERGREEN RESEARCH AND MARKETING,  
22 LLC  
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